TISA

Response by TISA to HMT consultation on the Review of the Financial Ombudsman Service

Sophie Legrand-Green, Head of Policy

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About TISA

Supporting the financial journey through life

The Investing and Saving Alliance (TISA) is committed to improving the financial wellbeing of all UK consumers by working collectively with the financial services industry to deliver solutions and champion innovation, for the benefit of people, our industry, and the nation.

We do this by working with our member firms to deliver practical solutions and devise innovative, evidence-based strategic proposals for government, policy makers and regulators that address major consumer issues.

We care about the entire financial life of consumers: from their first savings account opened to ensuring people can age and retire with dignity. TISA believes that savings and investments play a significant role in the lives of people and small businesses. Consumers benefit when they put aside money for their future. Saving and investing can provide a buffer for emergencies; help people achieve big and small goals throughout their lifetime; and give people quality of life in later years.

TISA is a not-for-profit membership organisation and a trusted partner of key industry stakeholders in helping shape the future of the UK financial services and the environment in which we operate. We have approximately 270 member firms involved in the supply and distribution of savings and investment products and associated services.

Our work, your influence

Our policy work reflects TISA's broad scope of interests and aims on meeting the needs of UK consumers, members and our industry. From improving financial education, inclusion and accessibility, right through to savings, investments and retirement planning, the work we do with our members to **influence policy** is crucial in enhancing the industry we operate in and driving positive change.

As part of our commitment to delivering focused and impactful consumer outcomes, TISA's policy working groups have been structured into **four distinct workstreams**:

1. **Consumer Protection -** *Protecting the best interests of UK consumers in their financial journeys.*
2. **Consumer Access -** *Considering issues that could directly impact access to financial products.*
3. **Effective Products -** *Examining key considerations and legislation relating to products across the investing and saving landscape.*
4. **Corporate Responsibility**
   Exploring issues that directly impact society, the environment, and the economy.

All groups focus on both strategic and technical elements of policy/regulation. We provide a channel for firms to have their say on the policy we develop and present, contribute to our technical and regulatory interpretation work and, importantly, gain insights from other TISA members, policy makers, government and regulators.

Find out more about TISA here: **www.tisa.uk.com/about-tisa**

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Summary of Recommendations

TISA welcomes the opportunity to respond to HM Treasury's consultation on its Review of the Financial Ombudsman Service (FOS).

We are supportive of HMT's policy objectives and think many of the proposal, in principle, will achieve a more transparent and consistent FOS. However, careful consideration needs to be given to how these proposals are implemented in practice to ensure they achieve their intended policy objectives and do not have unintended consequences.

As HMT, FCA and FOS progress this policy work, we would encourage a strong degree of active engagement with industry and membership associations. We have an opportunity to increase trust, efficiency and growth if there is a strong public/private partnership.

I would like to thank HMT for the opportunity to comment on the Review of the FOS. This continues to be an area of fundamental importance to TISA and TISA members. I would be happy to discuss these recommendations and any other aspects of the TISA response. We look forward to HMT finalising their policy work and stand ready to engage, collaborate and lend out support to help achieve a better redress system.

Sophie Legrand Green
Head of Policy, TISA.

Responses to Consultation Questions

Question 1: Do you agree that, where conduct complained of is in scope of FCA rules, compliance with those rules will mean that the FOS is required to find a firm has acted fairly and reasonably?

Yes, this should naturally follow.

Question 2: Will the aligning of the Fair and Reasonable test with FCA rules still allow the FOS to continue to play its relatively quick and simple role resolving complaints between consumers and businesses?

Yes, if anything it should make the process quicker and simpler as it provides a clear, known framework against which the FOS can make determinations.

Question 3: Do you agree with the proposed approach for dealing with law which may be relevant to a complaint before the FOS?

We do not recommend consumers having to pursue matters via the courts, given the time, cost and mental fortitude required to do this.

Question 4: Do you consider that there are some cases that are not appropriate for the FOS to determine, bearing in mind its purpose as a simple and quick dispute resolution service? How should such cases be dealt with?

We would recommend that caution is exercised here. Given the costs, time and stress associated with taking a matter through the courts, we would be reluctant to support a process that removes cases that are currently within the FOS' scope.

Question 5: Do you agree that there should be a mechanism for the FOS to seek a view from the FCA when it is making an interpretation of what is required by the FCA's rules?

Yes, we think this would drive consistency in FOS decision making and provide consumers and firms with confidence in the FOS and the overarching complaints handling process. However, this mechanism needs to be given careful consideration in order to ensure the mechanism is effective. Please see our response to Question 8 for further detail.

Question 6: Do you agree that parties to a complaint should have the ability to request that the FOS seeks a view from the FCA on interpretation of FCA rules where the FCA has not previously given a view?

Yes. However, there needs to be transparency as to whether the FCA or FOS will determine whether a matter is actually referred, including the associated criteria that will be applied when making this determination. For example, there is an indication in the paper that a referral would only occur if a significant number of similar cases depend on the appropriate application of FCA rules. It would be

useful for HMT (or FCA/FOS) to clarify what qualifies as a "significant number of similar cases". In addition, it would be useful for there to be further clarification and definitions as to the type and nature of the issues FOS can refer to the FCA. For example, is it possible to refer one issue, or does there need to be multiple issues to warrant a referral?

Question 7: Do you agree that parties to a complaint should have the ability to request that the FCA considers whether the issues raised by a case have wider implications for consumers and firms?

Yes, although we suspect in practice, regulated firms and FOS will make referrals. As noted in our response to question 6, it would be useful to understand if HMT, FCA or FOS intend to include any criteria, limitations or preconditions on the ability of parties to request a referral to the FCA and the nature of any such criteria. Given the information that is available to a customer (i.e. only the facts of their compliant), it is unlikely that they will be able to determine whether their complaint relates to a wider issue, or whether the underlying FCA rule is unclear. In light of this, we think it is unlikely that consumer requests will meet relevant referral criteria and thus, most, if not all, successful referrals will be made by firms or the FOS.

HMT may determine that it is more efficient to only allow a regulated firm or the FOS to have this option.

Question 8: As part of implementing the proposed referral mechanism, do you think there are any issues which should be considered in order to ensure the mechanism works in the interests of all parties to a complaint?

Yes and we would expand upon these considerations so that they include the consideration as to whether the mechanism works for the wider financial services industry and customer base.

We think the referral mechanism should be guided by the following principles:

1. Transparency should be prioritised. While the current consultation does not mention the publication of FCA interpretations, we think it is very important that FCA positions are published. Otherwise, there is an unlevel playing field where only the parties to the complaint (and FOS) will know the FCA's interpretation. This (anonymised) information should be made available to all market participants and consumers, so that all can benefit from this information. For example, if the FCA's interpretation changes existing application of FCA rules, then all firms should be able to access the interpretation, so they can review their processes and approaches and take appropriate action, as required. Publishing the key trends that draw on FCA interpretations should also prevent repeat referrals, as firms and consumers would be able to access existing FCA positions. This would provide operational efficiencies, making the FOS process simpler and quicker and reduce complaints due to better firm understanding of FCA rules. In addition, there should be transparency as to the decision making framework the FOS will apply when determining whether a party's request

to refer a matter to the FCA will be accepted or rejected. Any FOS decision making framework should be transparent so that parties can understand any restrictions, preconditions and how the mechanism works in practice.

2. FCA interpretations should be subject to appropriate governance. We see 2 tracks applying to the FCA's interpretations:
    i. Where the FCA is simply restating existing policy positions (e.g. by restating the policy intention that was outlined and published in a consultation or policy paper), then this should be a fairly straightforward process. This process should not require duplicative governance, because the existing positions will have gone through FCA governance and approval processes, depending on the relevant FCA output. For example, consultation papers are subject to existing FCA executive sign off procedures. The relevant FCA Policy Team, working with FCA lawyers, should be able to provide the FOS and parties to a complaint with their position within the proposed 30 day time period.
    ii. Where FCA is providing a new position, this should be subject to consultation. This recognises the status that FCA interpretations will have – i.e. FOS will apply them, so they are binding on FCA-regulated firms. When stating a new position, the FCA is effectively creating a new form of guidance or regulation. Firms will be bound by this and we expect compliance and legal teams to review and assess interpretations in the same way in which they review and assess current FCA positions. In light of this, where the FCA provides a new position, appropriate consultation should be undertaken. This would be consistent with the constitutional basis of FCA's rule and guidance making powers. The FCA can use its Quarterly Consultation Papers (QCPs) or any other relevant consultation as a vehicle to do this. Any FCA consultation would be subject to existing FCA governance processes, so there would be no need to create additional, new governance processes. We note that this process is likely to take more than 30 days, which should be reflected in the referral and complaints process. An alternative option could be for the FCA to provide an indicative view, subject to their consultation. The indicative view could be used by FOS, if all of the parties to the complaint agree – but there should be no obligation on the parties to agree.
3. The FCA should give careful consideration to the scope and limitation of any positions. Given the binding status of any FCA position, it is essential that the FCA clearly specifies the relevant scope and limitation of any position. As mentioned, if FCA positions are published, it is highly likely that any FCA position is reviewed and analysed by firms, law firms, consultancies etc. In light of this, the FCA must be alive to the risk that firms may "over-interpret" or "under-interpret" any FCA statement. A similar phenomenon has occurred in respect of financial promotions, where one-off comments by the FCA can have a ripple effect across a firm and the wider industry. The FCA should also consider the extent to which any interpretation they give should or will apply retrospectively. This demonstrates the need for the aforementioned consultation stage, so that the industry and consumer groups can provide their views on this matter. In order to ensure that firms take the correct messages from any FCA position, the FCA should clearly outline the precise scope and any limitations to the interpretations that they give. This information will also enable the FOS to make

confident decisions, as they will have clarity on the FCA's position. It will also enable the FOS, consumers and firms to understand the scope of any FCA position and when a new, separate referral is required.

Question 9: Do you agree that the Chief Ombudsman should have overall authority for determinations made by FOS ombudsmen, and through that authority, should be responsible for ensuring consistent FOS determinations?

We are not opposed to this proposal, albeit we are also not convinced this will lead to a material improvement in the FOS' decision making. Instead, HMT could consider leveraging the principles of the FCA's Senior Managers and Certification Regime (SMCR). SCMR aims to encourage staff to take personal responsibility for their actions, improve conduct, ensure key decision makers have appropriate expertise, skills and knowledge, and make sure there is a clear, consistent understanding of who does what. The FCA's review of SMCR has improved accountability, led to stronger tone and ownership and developed a better culture.

We strongly support efforts to ensure the FOS is resourced with suitably qualified and experienced individuals who have clear responsibilities and accountabilities. We think encouraging and instilling a transparent and consistent culture and leveraging the principles of SMCR would also lead to a drastic improvement in the FOS' decision making and reputation.

Question 10: What approach to transparency arrangements would provide the most accessible way for consumers and firms to understand what outcomes to expect for particular types of cases that the FOS deals with?

Requiring the FOS to publish its decision making frameworks would enable consumers and firms to understand how complaints are handled and the key factors that are taken into account when the FOS makes a determination. If the decision making framework is applied consistently then consumers and firms will be able to understand what outcomes to expect for a particular type of case. In addition, firms would be able to align their internal complaints handling processes with the FOS' approach, driving up standards and reducing the likelihood that matters are raised with the FOS. We strongly recommend that the FOS prioritises its work to create these decision making frameworks, and engages with the industry experts and consumer groups to encourage trust and reliance on the frameworks. TISA stands ready to support this activity.

Question 11: Do you think the package of reforms outlined above, taken together, will be sufficient to address the problems identified by the review and ensure the FOS fulfils its original purpose?

As mentioned we would encourage an approach that seeks to leverage the benefits of the SMCR. The underlying principles are applicable here, as they would seek to enhance expertise, decision-making responsibility and consistency as well as transparency. The FOS could also consider adopting the Technical Specialist role that has been adopted by the FCA and PRA. This would enable FOS

departments and teams to access specialist expertise from individuals that have experience working in relevant sectors. This practical knowledge and experience could provide invaluable context that can support informed FOS decision making.

Question 12: Taking into account the other reforms proposed in this consultation, do you think that the FOS should be made a subsidiary of the FCA? If so, what are your views on the appropriate institutional arrangements?

No. We agree with HM Treasury that the independence of the FOS is central to ensuring trust in financial services.

Question 13: Do you agree that 10 years is an appropriate absolute time limit for complainants to bring a complaint to the FOS?

No. We are not convinced that this proposal will achieve the intended certainty. We are also not convinced that there is an underlying concern that warrants this proposal.

It is also unclear why HMT has adopted a starting position of 10 years, providing less time than that afforded under the Limitations Act. Given FOS's purpose, it would seem strange to afford consumers lesser rights than those that are available to them via a court process.

Question 14: Do you agree that the FCA should have the ability to make limited exceptions to this time limit?

Please see our response to question 13. We are not convinced that these proposals will successfully work, particularly where there is a mass redress event that is outside of the time limit. We are concerned that any complaints that centre on an event that no longer qualifies for the FOS regime is likely to undermine trust in financial services.
It is also unclear whether any FCA determination would apply retrospectively or not, further limiting the utility of this proposal.

Question 15: Do you agree that the FCA should have more flexibility, when investigating a potential MRE, to take steps that are designed to avoid disruption and uncertainty for consumers and firms? In addition to the proposals made above, do you think there are other tools for the FCA which should be considered?

Yes.

Question 16: Do you agree that there should be a simpler legal test for the FCA to satisfy in deciding that a section 404 redress scheme is needed to respond quickly and effectively to an MRE?

Yes.

Question 17: Do you agree that the FCA should be able to direct the FOS to handle complaints consistently with relevant redress schemes, or to direct the FOS to pass related complaints back to firms, to be dealt with by those redress schemes?

Yes.